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Supreme Court of the United States

October Term, 1934

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants

v.

THE UNITED STATES OF AMERICA, *et al.*
Appellees

No. 607

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,
Appellant

v.

THE UNITED STATES OF AMERICA, *et al.*
Appellees

BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

CHARLES E. COTTERILL
Solicitor for Appellant The Union Stock Yard and Transit Company of Chicago
70 East 45th Street
New York, N. Y.

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October Term, 1934, Nos. 606 and 607

IN THE

Supreme Court of the United States

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Appellants*, v. THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 606
THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, *Appellant*, v. THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 607

BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

These cases are before the Court on separate appeals from a decree of the United States District Court for the Southern District of New York (three judges sitting) in

which a suit to annul and enjoin enforcement of an order of the Interstate Commerce Commission was dismissed (R. 63, 70, 87, 91). The suit was instituted by twenty-four trunk line railroad companies (R. 3). The Union Stock Yard and Transit Company of Chicago became a party thereto upon application to the court (R. 47) which was granted (R. 48) as a matter of right inasmuch as such company had been a party defendant in the proceedings before the Commission (Sec. 208 Judicial Code).

After dismissal the District Court granted a stay of the Commission's order for thirty days (R. 66, 70) in the course of which a new stay was granted by a Justice of this Court to hold good until disposition of these appeals (R. 79).

Outline of Situation and the Decisions of the Commission and the Court Below

There will shortly be described the proceedings before the Commission, the decision of the court below and the principal questions before this Court. First a few facts are stated so that the situation out of which the controversy arises may be clarified.

(a) Essential Facts

The Union Stock Yard and Transit Company of Chicago (hereinafter called the Yard Company) is a public stockyard subject to the jurisdiction of the United States Secretary of Agriculture (*Stafford* v. *Wallace*, 258 U. S. 495). At the edge of the Yards are numerous so-called "unloading pens" into which livestock is at first put when unloaded from railroad freight cars. Generally the live-

stock is then taken immediately from the unloading pens to "holding pens" inside the Yards. The duration of the stay in holding pens is variable depending upon disposition of the animals.

A number of large packing companies have their plants outside the Yards and remove their livestock from the holding pens through the Yard properties to such plants. The Hygrade Food Products Corporation is one of them, and it is also served directly by one of the trunk line railroads.

Sometimes the Hygrade Company takes its livestock direct from the unloading pens when its employees are there before removal into the holding pens. In taking livestock direct from the unloading pens the Hygrade Company likewise drives it through the extensive Yard properties onto and over a viaduct runway owned by the Yard Company and leading into the packing plant outside.

Neither the Hygrade Company nor any other concern has a right to enter the Yard properties or to use such properties for their incoming or outbound shipments except upon compliance with the rules and regulations and upon payment of "yardage" charges of the Yard Company which are imposed against consignees for use of the yard facilities respecting livestock whether taken from unloading or from holding pens. Imposition of yardage charges by the Yard Company under both circumstances has been a continuous practice for more than sixty-five years. Such charges and the regulations surrounding their imposition are now covered by tariffs lawfully on file with the United States Secretary of Agriculture as required by the "Packers and Stockyards Act" of Congress (Ex. 23).

While owning several hundred miles of railway track-

age outside the Yard properties neither the Yard Company nor any concern with which it is affiliated directly or indirectly operates any railroad. The rail facilities so owned by the Yard Company are leased and operated by the New York Central Railway through a subsidiary. That railroad, in turn, has granted to other trunk line railroads the privilege of coming over its line to the Yard properties under a conventional arrangement between them with which the Yard Company has no direct relation. That important change occurred with the approval of the Commission long after this Court's decision in *U. S.* v. *Union Stock Yards*, 226 U. S. 286 (*R.* 147 *et seq.*).

For a small amount of compensation which it receives from the trunk line railroads the Yard Company unloads the livestock from the railroad cars into the unloading pens and it likewise does for them some clerical work such as collection of railroad charges and handling of the freight billing. In that sense and to such extent the railroad companies utilize the properties and services of the Yard Company as their "terminal." It is there and in that way that most of the Chicago livestock is handled.

Railroad willingness to deliver livestock at this public stockyards has never been unconditioned. They have never obligated themselves to shippers and receivers in such way as to put upon the railroads the expense of providing the public yards. The whole limit of railroad obligation to deliver at the Yards at all has been restricted to the placement of the livestock into the unloading pens. The tariffs on file with the Commission in effect so declare (R. 178, 179).

The railway companies are also obligated under their tariffs to make direct delivery of loaded cars of livestock

at the plant of the Hygrade Company outside the Yards and have other places of their own on their rails in Chicago at which they provide loading and unloading facilities and where no yardage charges are imposed. The Hygrade Company would be required to pay railroad switching charges for direct delivery of loaded cars at its plant and it deems such transportation costs higher than it can afford to pay. Its packing plant is located quite far away from the individual railroad-owned livestock unloading facilities at different places in Chicago and it deems the use of such railway facilities inconvenient (R. 121, 122). Therefore the Hygrade Company prefers to use the facilities of the Union Stock Yard in having shipments of livestock transported to it at that place and adjacent to which its plant has been located.

(b) Proceedings Before the Commission

The involved order of the Commission was entered in July, 1934, as the consequence of a formal complaint proceeding instituted by the Hygrade Food Products Corporation and reported in 195 I. C. C. 553 (R. 24, 37).

In such proceedings before the Commission the Hygrade Company first contended that the charges imposed by trunk line railroads for switching loaded cars of live stock directly to the plant of the Hygrade Company were inapplicable, unreasonable and discriminatory. As to such part of the complaint the holding of the Commission was that the lawfully applicable railroad rates for such switching of carloads to and delivering them immediately at the plant of the Hygrade Company were neither unreasonable nor discriminatory.

Another contention of the Hygrade Company before the Commission was in regard to the "yardage charges" imposed by the Yard Company on all live stock received by the Hygrade Company at such public stockyards from railroads making deliveries thereat upon the request of the Hygrade Company and taken by the Hygrade Company through the properties and by means of the special facilities of the Yard into the packing plant of the Hygrade Company located outside. Such complaint was directed to imposition of the yardage charges whenever imposed whether in instances of removal from "unloading pens" to the "holding pens" and thence to the packing plant or in instances when taken directly from the "unloading pens" through the Yard properties over the viaduct into the packing plant located outside.

The Commission stated that issue before it in the following terms:

> "Complainant does not allege that the yardage charges in issue are unreasonable if they may be lawfully applied, and relies upon Section 15, Paragraph (5), of the Act, which provides that * * *."

The holding of the Commission was that such imposition of "yardage charges" was not unlawful when the live stock was taken by the consignee from "holding pens"; but when delivery is taken at the unloading pens it is not "subject" to yardage charges. The language of the Commission was as follows:

> "We further find that livestock in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens."

The affirmative order of the Commission required cessation of the charge for yardage for such use of the yard properties and facilities by the Hygrade Company when the latter takes its livestock out of "unloading pens" into its packing plant.

Both the trunk line railroad defendants and the Yard Company were made responsive to the Commission's order to cease and desist. It is the validity of that report and order of the Commission which is involved in this litigation.

The Commission seemingly dealt with such question of the yardage charge as if one of law. It deemed the placement of livestock into "holding pens" and removal therefrom "not necessary" to effectuate delivery and that therefore an extra yardage charge may be imposed by the Yard Company in that event. But in instances when the Hygrade Company takes its livestock directly from the unloading pens over and through the Yard properties and the viaduct into its packing plant outside, the Commission considered the imposition of a yardage charge by the Yard Company to be "unlawful." Just what provision of the Interstate Commerce Act is thought by the Commission majority to be violated is not determinable from the report. The "order" subsequently entered speaks of the "unlawful practice" of assessing this yardage charge but does not reveal what part of the statute is thought applicable. Counsel for the Government, in seeking to defend the order, point to the decisions of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, and *Adams* v. *Mills*, 286 U. S. 397, together with the provisions of Section 15(5) of the Interstate Commerce Act.

There are no findings, basic or otherwise, which illuminate the Commission's intent.

In the case of *Adams* v. *Mills*, this Court dealt with the situation at Chicago prior to enactment of Section 15(5). It there upheld an express finding by the Commission that under the particular facts at Chicago which the Commission described it was "unreasonable" for the railroads not to bear the whole expense of *unloading* the livestock into unloading pens. The decision of the Commission in the present case is that it is "unlawful" for the shippers to be required to pay a "yardage" charge for the use of the public stockyard facilities *after* unloading of the livestock into unloading pens.

The report of the Commission in these proceedings discloses close division of thought on the question of law involved. Five of the eleven members voted for complete dismissal on the ground of lack of jurisdiction. Of the six who voted for the affirmative order one concurred specially on grounds differing from those of the other five making up the majority.

This close division on the law applicable in such cases came after decisions in other and earlier cases since 1920 exhibiting both disagreement and a shifting of majority view.

Southwestern H. & M. Co. v. *A. T. & S. F. Ry. Co.*, 129 I. C. C. 730;

Strauss and Adler v. *N. Y. C. R. Co.*, 153 I. C. C. 609;

Allied Packers v. *A. T. & S. F. Ry. Co.*, 161 I. C. C. 641;

Kahn's Sons Co. v. *B. & O. R. Co.*, 192 I. C. C. 705;

Gobel, Adolph v. *B. & O. R. Co.*, 200 I. C. C. 606.

As stated there was no finding of "unreasonableness" here in terms as there had been in the case reviewed by this Court in *Adams* v. *Mills*. Instead the Commission majority stated that:

> "Complainant does not allege that the yardage charges in issue are unreasonable if they may be lawfully applied, and relies upon Section 15(5) of the Act."

Addressing itself to that issue, the considerations which apparently controlled the Commission were stated by it as follows:

> "The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all of these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make."
>
> • • • • • • •
>
> "Under this provision of the Act (Sec. 15(5)) which applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards, no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge *for the mere placement* therein of the livestock. The fact that the line haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards." (Covington Stock Yards *v.* Keith, 139 U. S. 128, then cited and quoted from. (Italics supplied.)
>
> • • • • • • •

"It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens."

* * * * * * *

"We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens."

While the yardage charge found unlawful is imposed, collected and retained solely by this public Yard Company for its own account the majority view of the Commission undoubtedly was that the *railroad* companies owe to consignees the duty of enabling them to take their livestock out of unloading pens in this public stock yards through the yard properties into their packing plant outside without payment of the yardage or any other charge. Viewing the yard properties as constituting in law a "terminal" of the trunk line railroads the thought of the Commission evidently was that it is incumbent upon the railroad companies to do at this public yard what would be required of railroads at yards of their own and to engage and compensate the Yard Company for so allowing consignees to come upon and use the Yard properties for removal of livestock from unloading pens into the packing plants which are beyond the boundaries of the Yard area.

The Commission did not discuss the status of the Yard Company as a proper defendant before it in the case. It did not respond in terms to the insistence of the Yard Company that the Commission lacked jurisdiction (R. Ex. 1) as to it because, subsequently to the decision of this Court in *U. S.* v. *Union Stock Yard*, 226 U. S. 286, it had, with the sanction of the Commission, ceased to be a "common carrier engaged in the transportation of property by railroad."

(c) Decision of the Court Below

The real question here is the validity of the Commission's order. But as this is an appeal from the District Court's decision it is appropriate to state what was its view of the case.

Early in its decision the court first declared the holdings of the Commission were that the yardage charge was imposed for the "mere placement" of livestock into the "unloading pens," that this constituted "no assessable service rendered by the Yard Company," and that such "practice" was determined by the Commission unlawful *under Section 15(5) of the Act.*

The language of the court at that place in its opinion was as follows:

> "The Interstate Commerce Commission found the Yards Company to be a livestock terminal for the line haul carriers bringing livestock to Chicago, and that consignees were entitled under Par. 15(5) of the Interstate Commerce Act (41 Stat. 456, 484, U. S. C. Title 49) to delivery at pens, suitable for proper delivery, without charge, and that the mere placement therein of livestock constituted no assessable service rendered by the Yards Company."

Thus at that place in its opinion the Court construed the action of the Commission to have been grounded upon the requirements of Section 15(5) of the Act which defines railroad duties in the delivery of livestock at public yards. But thereafter in its opinion the Court departed from its construction of the Commission's holding and dealt with the matter as if one in which the Commission had held Section 15(5) *not* to be controlling or a limitation upon its authority to find "unreasonable" railroad practices affecting delivery charges under Sections 1(3)(6), 13(1)

and 15(1). This entirely different conception of what the Commission had decided is revealed in various parts of the Court's opinion and particularly so in the concluding language of the Court as follows:

> "We think the Commission properly ruled that Section 15(5) of the Act to regulate commerce did not limit its jurisdiction over terminals and terminal facilities of the line-haul carriers, and that its jurisdiction extended as provided for in Para. 3, Sec. 1 of the Act."

The Court's own view was that while Section 15(5) declares what the railroad duty shall "include" when delivering livestock at public terminals the Congressional intent was to leave the Commission free to impose upon railroads even greater duties when found "reasonable" under Sections 1 and 15 of the statute. The Court did not say, however, that any such conclusion of "unreasonableness" had been declared by the Commission.

Moreover, the Court did not inquire whether the Commission was right in attributing the yardage charges to the "mere placement" of livestock "into unloading pens," or whether as *conclusively* shown by the record before the Commission, such charge was imposed by this public stockyards for the use of its properties and facilities in removing the livestock out of the unloading pens into the plant of the Hygrade Company contiguous to the Yards. And in respect to the view of the Court that the Commission possessed the authority to prescribe a "reasonable" practice under Sections 1 and 15 of the Act (independently of Sec. 15(5)) the Court did not point to any "findings" of the Commission as to "unreasonableness" nor did it describe any evidence before the Commission which would have sufficed to support any such findings had they been made.

As to the contention of the Yard Company that it is not subject to the jurisdiction of the Commission, the Court held it to be "not essential" to decide whether the Yard Company afterwards ceased to be and is not now a "common carrier engaged in the transportation of property by railroad" although it formerly was such when so held by this Court years ago in *U. S.* v. *Union Stock Yards*, 226 U. S. 286. As to that important question the court below considered the Yard Company properly subject to the Commission's order for the reason that it "supplies to the railroads the means by which" the railroads undertake to effectuate delivery of livestock at the public yards in Chicago.

The court below further held that the *trunk line railroads* are under the duty of compensating the Yard Company for all the yard properties and facilities which the railroads do or should use in discharging their full duty to consignees, and that should disagreement hereafter arise concerning what the amount of such compensation should be the proper remedy would be for the parties to have recourse before the Commission under Section 15(6) to fix "divisions" of "joint through rates." While thus declaring the *railroad* duty to consignees embraces provision for free use of the public stock yards in removing livestock from unloading pens and that the railroads should compensate the Yard Company for such added shipper use of its properties and facilities, the court nevertheless held the Yard Company responsible under the Interstate Commerce Act, along with the trunk line railroads, for such failure of the trunk line railroads to do what the court says the *railroads* are required under the law to do.

Specification of Errors and Summary of Argument

Now that the case is before this Court it is apparent that the important questions of error to be decided are:

1. Is the Yard Company subject to the jurisdiction of the Commission?

2. Whether subject to such jurisdiction or not, did the Commission lawfully direct its order to the Yard Company as well as to the trunk line railroads?

3. Is Section 15(5) a complete declaration of railroad duty in delivering livestock at public stockyards under the circumstances of this case and does the Congressional statement of what such duties "include" mark the whole limit of railroad obligation; or would it be competent for the Commission to consider that because the railroads are willing to deliver the livestock of consignees at this public stockyards they have in that way and to such extent made of the Yards "their terminal" carrying with it the same obligation of providing "free passage" into and out of the Yards as would be the railroad duty at the individual yards of their own which this Court described in *Covington Stock Yards* v. *Keith*, 139 U. S. 128.

4. If Section 15(5) were not controlling did the Commission hold as a matter of law that the yardage charge here involved is "unlawful" and, if so, did it err?

5. If the Commission's decision did not rest upon a conclusion of law was its conclusion "administrative," in the nature of a determination of "unreasonableness" of a railroad practice, in which event are there any "basic findings" sufficient to support such a conclusion?

6. Would the Commission have been warranted by any evidence before it in a conclusion of "unreasonableness"?

The Yard's position on these controlling questions is:

1. The Commission lacked jurisdiction over the Yards because, ten years ago, it sanctioned changes in the Yards' activities and relations with railroads that caused the Yards no longer to be a "common carrier engaged in the transportation of property by railroad."

2. Even if it were subject to Commission jurisdiction the Yard Company is not at fault in this matter whatever may or may not be the obligations of railroads to shippers and consignees at that place. The Yard Company has not been employed by the railroads to do for them more than to unload the livestock into unloading pens and to perform certain clerical services. It has no control over the railroads. It is not party to any through rates capable of "division" under Section 15(6) of the statute. If it were to be the law that railroads should provide consignees with "free passage" into and out of this public stockyards the refusal of the railroads to do so is not something for which an order of the Commission may be directed against the Yard Company.

The foregoing propositions are in the main distinctive to the Yard Company and, if sustained, would nullify the Commission's order as to it.

The Yard Company also joins with the railroad appellants in the respectful insistence that in its entirety the order of the Commission should be annulled and its enforcement enjoined for these reasons:

3. In the enactment of Section 15(5), and soon thereafter the Packers and Stockyards Act, the full Congressional intent is revealed. The force of those two statutes combined causes railroad duty to end with the delivery and unloading of livestock "into suitable pens" "at" public stockyards. The use of other properties of the Yard Company by consignees and shippers in having railroads transport the livestock to this public stockyards and in the removal of it therefrom by means of the Yard facilities and properties is a "public stockyard" activity for which consignees and shippers must separately pay the Yard Company under tariff charges filed with the United States Secretary of Agriculture who alone has jurisdiction.

5. The Commission put its decision upon conclusions of law and did not truly seek to exercise any supposed authority to make independent "findings" of "unreasonableness" of railroad practices even if such separate authority existed. But in any event this assessment of "yardage charges" has been continuous for sixty-five (65) years and the railroads have never engaged themselves to do more at the Union Stock Yards in Chicago than to unload the livestock into unloading pens. This is not inherently unlawful under Section 15(5) or any other particular provision of the Act; it is not inherently unlawful under the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128; no conclusion of "unreasonableness" is supportable by any facts shown of record before the Commission such as prevailed in *Adams* v. *Mills*, 286 U. S. 397; nor did the Commission make any "basic findings" requisite to sustain a conclusion of unreasonableness had such a conclusion been intended.

ARGUMENT

PART ONE

I

The Union Stock Yard and Transit Company of Chicago is not a "common carrier engaged in the transportation of property wholly by railroad" within the provisions of the Interstate Commerce Act and therefore is not subject to the jurisdiction of the Commission.

At one time the Yard Company was a "common carrier engaged in transportation by railroad" and held to be such by this Court in *U. S.* v. *Union Stock Yards*, 226 U. S. 286. Long afterwards, with the sanction of the Commission, the Yard Company changed so fundamentally its activities and its relations with railroads that now it is believed no longer to be subject to civil orders of the Commission. Before the Commission the Yard Company denied jurisdiction both in its pleadings and in the evidence. The report of the Commission makes no findings as to the change of facts and denied rehearing without assignment of reasons. This lack of findings as to facts upon which the jurisdiction of the Commission depends should invalidate the order. It puts upon this Court the burden of ascertaining the facts from the lengthy record. They are in substance as follows (R. 148 *et seq.*).

Neither the Yard Company nor any holding company now operates any railroad or "hauls" or "engages in the

transportation" of any property by railroad. Neither it nor any holding company has any interest, direct or indirect, in any other company which operates a railroad or hauls or transports property to and from the Yard. While owning extensive railroad trackage and some equipment outside the Yards such properties were leased ten years ago to a subsidiary of the New York Central Railway with which the Yard Company is wholly dissociated. Since then the railway properties have been operated by the New York Central subsidiary and it, in turn, accords to other trunk line railroads the privilege of running their trains over the trackage to and from the Yards. The New York Central pays a fixed annual rental for its use of the railway properties. The Yard Company is now solely a "public stockyards" as defined in the "Packers and Stockyard Act" and is subject as such to the jurisdiction of the United States Secretary of Agriculture.

Adequate consideration of this important change of activity requires comparison of the particulars of the situation today and as they existed some years ago.

Before undertaking a comparison and analysis of this Court's previous decision in *U. S.* v. *Union Stock Yards*, 226 U. S. 286, attention is called to what is submitted to be an erroneous view of the court below that it is "not necessary" to decide this question of common carrier status.

(a) Necessity for Decision as to Whether the Yard Company Is a "Common Carrier by Railroad"

The whole of the Commission's jurisdiction to make orders of any kind against any party before it is derived from Section 1(1) of the Act. The part thereof which is material here is the following:

> "Sec. 1(1) That the provisions of this Act shall apply to common carriers engaged in—(a) the transportation of passengers or property wholly by railroad • • •."

Thereafter, throughout all the provisions of the statute, each command and prohibition is directed to "common carriers subject to the provisions of this Act."

It must follow that whether or not the Yard Company is subject to the jurisdiction of the Interstate Commerce Commission depends *solely* upon the question whether it *is* a "common carrier engaged in the transportation of property wholly by railroad." The court below declared that it was "not essential" to make a decision as to such matter. Seemingly the view of the court below was that whether the Yard Company be a common carrier by railroad or not:

> "The Commission found that the Yard Company was the livestock terminal for all complaining carriers. The Yards Company provided for the carriers the means of making deliveries of livestock to the consignees at this public yards. But the delivery was a part of the transportation and of the duty of the carrier. Covington Stock Yards *v.* Keith, 139 U. S. 128; Adams *v.* Mills, 286 U. S. 397."

Evidently it was the thought of the court below that a concern may be subject to the jurisdiction of the Commission even though it be *not* a "common carrier by railroad" within the provisions of the Act if it "supplies" to railroads the "means" by which the *railroads* discharge railroad "transportation" duties to the public.

No matter what a concern may do it is not subject to the jurisdiction of the Commission if the things which it

does do not constitute "common carriage by railroad" within the provisions of the Act. The things which it does may have a bearing upon the determination of its status and they need to be examined from that standpoint. However, there is no escape from the duty of deciding whether or not the things which it does constitute it a "common carrier of property by railroad." Therefore the court below erred in assuming that the jurisdiction of the Commission attaches to any sort of concern or its activities not coming within that category.

(b) The Situation When *U. S.* v. *Union Stock Yards*, 226 U. S. 286, Was Decided

When the Union Stock Yards was first established it was authorized so to do and did in fact construct many miles of railroad trackage from its properties and leading out to points of connection with trunk line railroads. Years afterwards the Yard Company leased all such railway facilities to the "Chicago Junction Railway." Both that railway company and the Yard Company were almost completely owned by a single holding company and such was the situation before this Court in 226 U. S. 286.

At that time the Chicago Junction Railway was a full-fledged operating common carrier of property by railroad. With its own locomotives and crews it was then engaged in "hauling" various kinds of property into and out of the stockyards district under joint through interstate freight rates. It *physically transported* such property for long distances between points of connection with trunk line railroads and shippers and consignees within and outside the yard area *using its own locomotives, crews, and other railway facilities.* Contemporaneously the Chicago Junction

Railway extended to the trunk line railroads the privilege of operating their own trains over the rails of the Chicago Junction for the purpose of receiving and delivering livestock at the stockyards. That was in the nature of a "trackage" agreement. Upon arrival of the loaded livestock cars at convenient places at the edge of the Yards the Yard Company emptied the contents into unloading pens nearby which the cars had come to rest. Additionally the Yard Company collected for account of the railroads their freight transportation charges and performed other clerical services incident thereto.

In the light of those facts this Court was required to consider whether or not both the Union Stock Yards and the Chicago Junction Railway constituted "common carriers by railroad" within the Interstate Commerce Act. As to the Chicago Junction the affirmative holding did not require or receive much discussion. But the Yard Company was likewise held to be such a "common carrier by railroad."

The reasoning of this Court reveals the basis for such decision. The separate corporate identities of the Yard Company and the Chicago Junction Railway were treated as non-existant because of the complete control of both by a single holding company.

Considering the two concerns as but one the court concluded that such single concern was engaged in the physical haulage and delivery of property both at and outside the yards in continuous through movements in interstate commerce over its own rails, with its own equipment, and under joint through rates with connecting trunk line railroads. The Yard then shared the earnings of the railway on a percentage basis. Continuing to view the two concerns as if one the court noted the trackage

arrangement with trunk line railroads by which the trains of the latter came to and from the Yard properties under the "trackage" plan which carried with it unloading of the cars by the Yard Company for account of the trunk lines. The controlling, outstanding fact which then existed was the actual *haulage* of freight property by the Chicago Junction Railway in its own name and behalf and its trackage arrangement with trunk line railroads referred to. As the Chicago Junction Railway was in every respect a full-fledged operating railroad common carrier and as it and the Yard Company constituted in law a single concern both physically transporting and making receipt and delivery of property the holding of this Court and the reasons for it are clear.

There was no holding that the Yard Company was or could be a common carrier by railroad *standing alone* and independently of its operation of the railroad properties through the Chicago Junction as a transporting carrier. The mere *ownership* of the railway facilities and the performance of unloading of livestock and certain clerical services in behalf of the trunk line railroads did not cause this Court to declare the Yard Company then to be a common carrier by railroad. The decision in that case has never since been cited by any court in support of the view that a public stockyards is made subject to the Interstate Commerce Act when it does not transport property but merely makes certain of its unloading facilities available to trunk line railroads in order that the latter may serve the Yards.

(c) Subsequent Change of Situation

Years after the decision mentioned there occurred a fundamental change in the situation just described. With

the sanction of the Commission (*In Re Chicago Junction Railroad*, 71 I. C. C. 631; 264 U. S. 258; 150 I. C. C. 32) a wholly owned subsidiary of the New York Central Railway leased all the properties of the Chicago Junction and the exclusive privilege of operating such railroad for a long term of years upon the basis of a fixed annual rental. The New York Central thereupon extended to other trunk line railroads trackage rights to and from the Yards. From that time onward the Chicago Junction Railway ceased to be "engaged in the transportation of property by railroad." While retaining its corporate existence it divested itself of all the functions of an operating common carrier entitled as such to deal with shippers and other carriers. It ceased to "haul" or otherwise "transport" property of any kind for any distance. It became as a consequence the mere possessor of a lease of the railway properties from the Union Stock Yard which lease it had, in legal purpose and effect, assigned over to the New York Central Railway. In substance the Union Stock Yard had directly leased the railway properties and the privilege of their operation to the New York Central for a long term of years.

As neither the Chicago Junction nor the Union Stock Yard in fact now operates any railroad or hauls or transports any property whatsoever there is no foundation for the proposition that the Union Stock Yards is a "common carrier engaged in the transportation of property wholly by railroad." To be subject to the jurisdiction of the Commission nothing else may suffice. The essential condition precedent to the Commission's jurisdiction is that a concern must actually be a "common carrier" which by its own meaning connotes some sort of institution which "carries" for the public from one place

to another. Mere charter power to be such a "common carrier" alone does not govern. Paragraph 1(a) of Section 1 continues on to provide that for a common carrier to be subject to the Act it must also be "engaged in the transportation of property." By those words Congress limited the scope of the Act in its application to particular concerns. The intent was to reach only those common carriers which are actually functioning as such in relations to the shipping public as transporters and haulers of goods. It was further made requisite that such concerns be those which "transport" property "wholly by railroad" or, under certain circumstances, partly by railroad and partly by water.

In declaring what constitutes a "common carrier by railroad" this court in *Wells Fargo & Co.* v. *Taylor*, 264 U. S. 175, said:

> "It is • • • one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier."

The holding in such case was affirmed in *U. S. ex rel.* v. *C. N. Y. & B. R. Co.*, 265 U. S. 292, and it was there stated that the definition in the *Taylor* case

> "—was not made to rest upon any peculiarity in the Act in review, but was said to be in accord with the ordinary acceptation of the words • • •."

In *U. S.* v. *American Railway Express Co.*, 265 U. S. 425, this Court further said:

> "The natural meaning of the term 'carrier by railroad' is one who operates a railroad • • •."

The scheme of the Act is plain in its intended application. It is designed to reach only those railroads which are "engaged in transporting" property in interstate commerce, and only those railroads operating as such and transporting property in interstate commerce as "common carriers."

The limitations in Section 1(1) of the original Act of 1887 (still in force) were so apparent that in order to reach certain other kinds of companies Congress in Paragraph 3 of Section 1 afterwards defined the term "common carrier" so that it would include by name pipe line companies, telegraph, telephone, and cable companies, express companies and sleeping car companies and "all persons natural or artificial engaged in such transportation or transmission as aforesaid as common carriers for hire" (Sec. 1, par. 3).

In further recognition of its intended restriction upon the general scope of the Act, Congress, in express terms, made a significant exception in Paragraph 1 of Section 20 dealing with annual reports. In the first sentence thereof it required such annual reports from all common carriers subject to the provisions of the Act and then added "and from the owners of all railroads engaged in interstate commerce as defined in this Act." Thereby, in respect to the particular matter of annual reports, Congress required that the "owners" of all railroads subject to the Act should make annual reports as well as "common carriers subject to the provisions of this Act."

(d) Not being a "common carrier engaged in the transportation of property by railroad" the Yard Company is not subject to the Commission's jurisdiction merely because in limited degree the Yard Company "supplies to the railroads the means" by which the railroads effectuate terminal delivery and that such railroad delivery comes within the statutory definition of "transportation."

The court below did not hold that the things which the Yard Company does cause it to be a "common carrier engaged in the transportation of property by railroad." It considered decision of such question "not essential." The view of the court was that the jurisdiction of the Commission extended to the Yard Company because it "supplies to the railroads the means" by which the railroads accomplish "terminal" delivery of livestock within the yards and because such *railroad* delivery by those "means" comes within the statutory definition of "transportation."

It is submitted that the court below erred, and, that unless the things which a company does are such as cause it to be a "common carrier in the transportation of property by railroad," it is not subject to the general jurisdiction of the Commission.

While the court below did not do so, it nevertheless is to be considered whether the things which the Yard Company does are of such character that it is or is not made thereby a "common carrier by railroad."

It has been shown above that no longer does the Yard Company itself or any concern with which it is affiliated "haul" or "transport" property by railroad. All interest in railroad operation has been divested and conveyed to a trunk line railroad company—the New York Central.

While the trackage is still owned by the Yard Company the New York Central has leased it at a fixed rental and extended to other trunk line railroads the right to come over it. In that way all the trunk line railroads bring livestock to the yard properties by means of their own trains and crews. The Yard Company, under agreements with such trunk line railroads, performs for a consideration only the manual labor of unloading the livestock out of the cars into contiguous "unloading pens" owned by the Yards. The freight charges of the railroads are collected from shippers and consignees by the Yard Company as employed agent for the railroads and certain clerical work incident to handling of the billing is similarly performed and paid for by the railroads.

It is because of such facts that the court below declared the Yard Company "is a terminal of the railroads" and supplies to the railroads the means "by which the railroads perform their duties to shippers in delivering livestock." Such "delivery" when done by railroads is made by statute an act of "transportation" by the railroad companies in Paragraphs 3 and 4 of Section 1 of the Act. Those facts do not however make the Yard Company subject to the jurisdiction of the Commission as a "common carrier by railroad."

(e) The "Terminal" Theory

Much is made of the statement by this Court in *Adams* v. *Mills*, 286 U. S. 397—

> "That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so."

Substantially the same thought appears in the majority opinion in the present case. If to the limited extent apparent certain of the yard facilities are so necessarily *used* by railroads that the railroads have in *part* adopted the yards as their own terminal, that fact would not lead to the conclusion that the Yard Company, whose properties are used by the railroads, is *itself* a "common carrier engaged in the transportation of property by railroad."

The expression by this Court in *Adams* v. *Mills*, was not used in connection with any controversy then before the court touching the question whether or not the Yard Company was a "common carrier by railroad." At the time dealt with in *Adams* v. *Mills* the Yard Company undoubtedly was a common carrier. It had been held to be such in the Commission proceedings then under review, and before this Court the Yard Company was then insisting that because of such determination of its common carrier status certain conclusions on the merits of that case should follow.

Whether or not this Court would now repeat the conclusion that to a limited extent the Yard properties are used by trunk line railroads as their "terminals" both in getting to the Yards and effectuating delivery into unloading pens it does not follow that such "terminal" use of the Yard properties by railroad companies makes the *Yard* Company a transporter of freight in the capacity of common carrier by railroad.

This ground has been thoroughly covered in principle in *Ellis* v. *I. C. C.*, 237 U. S. 434. It there was held that those who own and supply to railroad companies facilities which the latter use in the performance of their own

transportation duties to the public are not, by that fact alone, made common carriers by railroad "contrary to the truth." The argument then before this Court was that concerns of such character own and supply facilities of "transportation" as defined by Congress in Paragraph 3 of Section 1 of the Act. (The same contention was made in the present case to the court below.) In reply to that argument this Court in the *Ellis* case pointed out that the statutory definition of "transportation" in Paragraph 3 of Section 1 did not make common carriers by railroad out of those which otherwise are not such. Such definition, the court held, was *merely preliminary* to the subsequent requirement of *Paragraph 4* of Section 1 that the facilities of "transportation," as so defined, should be "furnished" by those who *are* common carriers "subject to the Act." The language of this Court on that point was:

> "The definition is a preliminary to a requirement that the carriers shall furnish them (the facilities described) upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth."

So here: were it to be granted that the term "transportation" as used in the Act embraces the railroad unloading of livestock into unloading pens (which the Yard Company performs as railroad "agent" under contract) and while the Yard Company owns the railway tracks upon which the New York Central runs its trains to the yard and that carrier extends to other trunk lines a like privilege, the Yard Company is the mere "owner" of certain property "used" by railroad companies and

performs only certain labor and clerical activities for such railroad companies merely as their "agent."

Such facts do not make the Yard Company subject to the jurisdiction of the Commission.

In further support of the position here taken attention is called to Section 15(13) of the Act. Congress there provided that railroads may make "allowances" to *shippers* whenever the latter perform for railroad companies any services of "transportation." There was no intent to make *shippers* common carriers by railroad subject to the Act under such circumstances.

(f) The "Agency" Theory

Only in connection with criminal provisions of the Act are "agents" of railroads directly regulated when not themselves common carriers. (See Sec. 10 of I. C. Act and Elkins Act.) Concrete application of the provisions directed to "agents" and the reason for such extension of the criminal law appear in *Spencer Kellogg* v. *U. S.*, 275 U. S. 566, affirming the comprehensive decisions of the courts below.

More than once this Court has declared that when a concern which in fact and in law is a "common carrier by railroad" happens to perform activities in behalf of other railroad companies as the agent of the latter the fact of such "agency" does not *relieve* such concern from its responsibilities as an operating "common carrier by railroad." It has never held that mere "agency" for a railroad alone makes the agent a common carrier if not otherwise such. *U. S.* v. *B. E. D. T.*, 249 U. S. 296; *Adams* v. *Mills*, 286 U. S. 397; *U. S.* v. *Union Stock Yards*, 226 U. S. 286.

In each of those cases the party before this Court was determined then to be engaging in the *haulage* of property by railroad in interstate commerce and functioning in all respects as "common carriers." Thus in the case of *U. S.* v. *B. E. D. T.*, 249 U. S. 296, this Court held the Brooklyn Eastern District Terminal to be a "common carrier by railroad" because in that instance the terminal company received carload and less-than-carload freight from trunk line railroads on the New Jersey side of New York Harbor—

> "and transports the same from their termini to its Brooklyn docks. And the cars containing such freight are hauled from the carfloats by its locomotives and placed for unloading either on its team tracks or at its freight houses."

Escape from legal restrictions there was sought on the ground that the things being done were for the account of some one or more other railroads in the capacity of "agent." The holding of this Court was, however, that a concern which in point of fact and law is a common carrier by railroad and so functions does not cease to be such because the activities are as "agent" and in behalf of other railroad common carriers.

But neither in the foregoing nor in any other case has it ever been held by this Court that the mere relation of "agency" could make into a "common carrier by railroad" a concern which otherwise is not such.

(g) Previous Commission Attitude

The decision of the Commission in the present case is wholly inconsistent with what it decided under analogous

circumstances in *A. T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Company*, 33 I. C. C. 92. There the Commission had before it a public stockyard company which owned but did not "operate" the railroad tracks within and leading into its properties. The Stock Yard Company permitted trunk line railroad companies to operate over its trackage with their trains and crews, paying to the Yard Company compensation therefor. In addition, the Yard Company at Kansas City unloaded the livestock for the railroad companies. The decision of the Commission was that the Stock Yard Company, while entitled to receive compensation from the railroad companies, was not in fact or in law a "common carrier by railroad" subject to the Commission's jurisdiction.

It is submitted that the decision of the Commission in the *Kansas City* case was correct and should have been followed here. While the Chicago Union Stock Yard is, to a limited extent, an "agent" or employee of the railroads and it is the "owner" of certain property which the railroads use in performance of terminal activities of the *railroads*, neither of those facts makes the Yard Company a common carrier by railroad subject to the jurisdiction of the Commission.

As to the Yard Company, at least, the court below erred in failing to enjoin the order of the Commission on the ground of lack of jurisdiction.

II

The Yard Company was not properly made a party to the Commission's order whether or not the railroad companies are fulfilling their duties.

The court below found that the Commission's decision was grounded upon the determination of duties imposed upon transporting railroad companies incident to *their* "line-haul" rates. Among those duties, the court declares, is to relieve shippers of any expense in taking their livestock at unloading pens in this public stockyards and passing it through and out of the yards. It was further held that while they have not done so, the railroads ought to engage and compensate the Yard Company for making available to the railroads such enlarged use of its properties and facilities. Failure *hereafter* to agree upon such compensation was said to be covered by Sec. 15 (6) of the Act respecting divisions of through rates.

Thus the statute involved and the decisions of the court and Commission dealing with it have to do with the obligations and duties of the *trunk line* railroads. The holding (whether right or wrong) is that such *trunk line* railroads have not *fully* discharged their obligations to shippers.

If all that were true, it does not show the Yard Company legally at fault. Rather, it negatives Yard responsibility. Even as to concerns which are avowedly common carriers by railroad, this Court declares and applies the rule that one may not be held at fault for the act or statutory liability of another. *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 286 U. S. 366; *Central R. Co. of*

New Jersey v. *U. S.*, 257 U. S. 247; *T. & P. R. Co.* v. *U. S.*, 289 U. S. 627.

The practical situation here before the Court seemingly comes well within the general principle stated. For 65 years the railroads at Chicago have deemed their transportation duty ended upon unloading of the livestock into unloading pens. On its part, the Yard Company, in that whole period of time, has functioned as a public stockyards and has been looking for most of its revenue from consignees and shippers of livestock who have chosen to direct railroads to make shipments to them at this public stockyards. Rightly or wrongly, it is now held, after all those years, that the railroads have made the Yards their "terminal," that as a consequence the railroads owe to the shipping public at such place the same obligations of "free passage" in and out of the Yards as the railroads would owe at yard facilities of their own located on their individual railroads, and that as a further consequence the railroads should enlarge their contractual relations with the Yard Company so as to engage more of its facilities and properties than so far they have chosen to do. While it is believed that such a holding is erroneous as a matter of law, it is submitted that there was no warrant for an order of the Commission directed to the Yard Company as if it were at fault. It has no control over the carrier or shipper. It serves both upon request. It is regulated by the Secretary of Agriculture in its services and charges. Its charges are conceded to be reasonable. It should not be made the victim of a quarrel between carrier and shipper as to who should pay them.

There is need to distinguish the situation from that with which this Court dealt in *Adams* v. *Mills*. There was

no "cease and desist" order involved in that case. At a time when it was a "common carrier by railroad," the Yard Company there had been specifically employed as their agent by the railroads to the extent of performing the "unloading" for railroad account. The railroads published in their tariffs that such expense of unloading would be borne by them by way of compensation to the Yard Company, but stated the amount of the absorption to be 25 cents per car. On its part, the Yard Company tariff then on file with the Commission described what its charge for such unloading would be, and in such tariff proclaimed itself to be the "agent" of the railroads in the performance of the *unloading* service for which it had been employed. When the Yard Company and railroads quarrelled over what the compensation should be for that agency service, the railroad companies, without changing their tariffs, collected from shippers the increased amount which the Yard Company then was demanding in its own amended tariff and turned the excess back to the Yard Company. It was under those conditions that this Court declared that the Yard Company was not "entitled to collect a part of its charges from the shippers"; and it there sustained a "reparation" order under those particular circumstances.

That is to say, in its capacity of railroad agent employed to do a particular thing this Court held the Yard Company could not escape its share of responsibility for having exacted from shippers extra compensation *for the doing of that which it had been employed and was being paid by the railroad companies to do for account of the railroads.*

Here the Yard Company has not been employed by the railroad companies to do more than the unloading and

collection of railroad charges from the shippers dealt with in *Adams* v. *Mills*. It has not been made the "agent" of the railroads beyond that extent. Its compensation from the railroads is not for "yardage" which the shippers and consignees obtain. Its yardage charge assessed against shippers is not for anything which the railroads have employed it to provide or do for shippers or for railroads. It does not collect such yardage charge for account of the railroads nor do the railroads collect it for the account of the Yards. It is the railroad companies and not the Yard Company which are under the obligation of fulfilling whatever the law declares to be the full duty of making "delivery." The Yard Company cannot make the railroads employ its facilities to any greater extent than the railroads wish. Whatever duties the law may put upon the railroad companies, their failure to discharge them is not something for which it can properly be held the Yard Company is responsible.

To say that the Yard Company is at fault would be to make one concern responsible for what is said to be an omission of legal duty by others. This, as heretofore declared by this Court, the Commission may not do.

The Court below cited *Covington Stock Yards* v. *Keith*, 139 U. S. 128, in support of its view that here the Yard Company may be held jointly at fault. But that case did not arise under the Interstate Commerce Act. No question of the jurisdiction of the Commission was involved. Nor did this Court in the *Covington* case make or sustain any order *directing* the Covington Stock Yard Company to rearrange its relationships with railroads and shippers. That case arose in a railroad equity receivership proceeding upon petition of Keith to the receivership court in

which there was sought an order directing the railroad receiver to deliver livestock to a yard owned by Keith. Thereupon the Covington Stock Yards voluntarily entered the case through a petition of its own to the court, which set up its possession of an exclusive contract with the railroad company, according to which the railroad company was precluded from delivering livestock elsewhere than at the Covington Yard. In its petition to the court the Covington Company sought and obtained an order requiring Keith, in that proceeding, to adjudicate with the Yard Company the validity of such exclusive contract.

The issue having arisen in that way, this Court sustained a decree of the Circuit Court holding that the railroad company was not meeting its lawful duties to shippers by virtue of such exclusive contract with the public stockyard company, since, as a result of such contract, the railroad *compelled* consignees to pay yardage charges to the Covington Company on any livestock shipped to that community. Such decree of the Circuit Court further provided that within a time limit thereafter the Covington Yard Company and the railroad should signify to the court a *voluntary* rearrangement of their relationship in such way as that shippers and consignees would be relieved of yardage charges at *that* place *or else the railroad company would be required to make delivery without yardage at the private yard of Keith.*

Thus the Covington Stock Yards was not made a defendant nor was any compulsion applied to it in the form of a court decree *requiring* it to forego yardage charges or to look to the railroad for payment. In the present case there is no refusal of trunk line railroads to deliver without yardage in the various railroad owned yards scat-

tered throughout Chicago. Nor is there refusal of delivery of loaded cars right at the plant of the Hygrade Company without yardage but upon the payment of lawfully established railroad switching charges.

The cases are wholly dissimilar, and nothing in the *Covington* decision of this Court supports the order here directed against the Yard Company.

The court below determined the railroads to be at fault in this matter and said it is their duty to enlarge the scope of their employment of and compensation to the Yard Company. It was further said that should there ensue hereafter failure of agreement as to the increased compensation to the Yard recourse could be had to Sec. 15(6) of the statute for the fixation of "divisions." It is clear, however, that the court below overlooked that the provisions of Section 15(6) apply only as between connecting "common carriers by railroad" which are subject to the Commission's jurisdiction and only to the divisions of "joint through rates" between them which may have been filed with or prescribed by the Commission under Section 6 or 15 of the statute. Those conditions do not here exist. This subordinate error of the court below may have contributed to its fundamental error in holding the Yard Company legally bound by the Commission's order.

For the reasons set forth in Part One of this argument it is, therefore, respectfully submitted that the order of the Commission is invalid as directed to the Yard Company.

PART TWO

The Invalidity of the Commission's Order in Its Entirety

The court below did not sustain the order of the Commission as a lawful exercise of authority to enforce the provisions of Section 15(5) of the Act. The court declared the Commission *possessed* administrative authority to find the yardage charge "unreasonable" as a practice regardless of Section 15(5). For that reason the order was sustained.

Such view ignores that the Commission's report and order do not purport to be an *exercise* of any administrative authority respecting the "unreasonableness" of a practice. The report of the Commission holds the consignee is not "subject" to the yardage charge and does not in terms identify the section of the statute so determined to be violated. The "order" of the Commission speaks of the "unlawful" practice in requiring that it be stopped. Nowhere did the Commission state or indicate a conclusion of "unreasonableness." It made no "basic findings" relevant to a conclusion of "unreasonableness" which would have been required had that conclusion been intended. (*U. S.* v. *B. & O.*, — U. S. —, decided Jan. 7, 1935; *Panama Refining Co.* v. *Ryan*, — U. S. —, decided Jan. 7, 1935; *Florida* v. *U. S.*, 282 U. S. 194; *Wichita, etc.* v. *Public Utilities Commission*, 260 U. S. 48.)

To have found "unreasonableness" would not have been supportable by *Adams* v. *Mills*, 286 U. S. 397, nor by the record before the Commission. At one place in its

report the Commission speaks as if it thought the yardage charge here involved is imposed for the "mere placement" into unloading pens. The court below so interprets the report. If such was intended by the Commission to be the basis for its decision, error of the clearest sort was committed. The yardage charge is imposed for the use of yard properties by consignees and shippers between the unloading pens and their plants outside the yards. It is not imposed for the "mere placement" into unloading pens when the livestock is taken out of the cars. The assessment of the yardage charge has been continuous for 65 years. It has always been collected by the Yard Company from the consignees for its own account. The activity calling for its assessment has always been outside the range of any agency employment of the Yard Company by the railroads. The tariff providing for it is on file with the United States Secretary of Agriculture—not with the Interstate Commerce Commission. Never have the railroads held themselves out to do more than to unload the livestock into the unloading pens within this public yards. Therefore the case was not one going to any question of "reasonableness."

The view of the court below ignored its own statement that before the Commission the case was dealt with by the Commission as one calling for application of Section 15 (5). Moreover, error resulted in determining that Section 15(5) is not a complete statement of railroad duty as to livestock destined to public stockyards. It was based upon the subordinate error of assuming that when Congress, in Section 15(5), declared what the railroad duty should "include," it meant to leave the Commission free to determine that some other and greater duty rested upon the railroads.

The wrongful view of the case followed the argument of Government counsel that both this Court and the Commission have declared the railroads to some extent use the Yard properties as "their terminal." Upon that premise the contention is made that a duty rests upon railroads to provide shippers with "free passage" to public stockyards when, as here, railroads hold themselves out as willing to transport livestock to a public stockyard and have employed some of its facilities in discharging the obligation incurred. Whether such contention rests upon the decision of this Court in *Covington Stock Yards* v. *Keith*, 139 U. S. 128, or upon Section 15(5) of the statute is not clear, and in either event would be erroneous. If to some extent the railroads use certain of the Yard facilities as "their terminal," no less do the *consignees* use the Yard facilities for *their* own convenience and purposes. The Yard serves both and neither shippers nor carriers have the right to come upon and use its properties without payment by the user of proper compensation.

The case of *Covington Stock Yards* v. *Keith* would not support this order of the Commission. Unlike the *Covington* case, this is not one in which the railroads refuse to make delivery at their own yards on their own rails without extra yardage charge. It is not one in which railroads refuse to make delivery of loaded cars on the private side track of the Hygrade Company. It is not one in which the railroads have given to the public stockyards an exclusive contract. Nor does the order of the Commission, like the decree in the *Covington* case, provide any alternative. Rather is the present case one in which the Hygrade Company, for its own convenience, seeks to use the Yard facilities and properties as the place to

which it desires the railroads to bring its livestock. This the railroads are willing to do upon condition that the Hygrade Company make its own arrangements with the Yard Company for the privilege of using the Yard properties for that purpose. The railroads have assumed no greater obligation than to unload the stock into suitable pens within the Yards. It is at such unloading pens that the railroads are willing to tender delivery. There is no compulsion by the railroads that the Hygrade Company use the public stockyard facilities as a means of obtaining its shipments. There is a willingness completely to discharge the common carrier obligation by providing "free passage" at the individual railroad livestock yards in Chicago. Nothing in the *Covington* case, under such circumstances, compels the railroads to assume the burden of relieving the Hygrade Company of its expense for "yardage" when using this public yard for its own convenience.

Nor would Section 15(5) support this order. Counsel for the Government seem not to argue to the contrary because it has been their endeavor to support the Commission's order on the other theory. Section 15(5) was, however, the one invoked by the Hygrade Company before the Commission. That amendment deals with the specific subject of railroad livestock delivery obligations at public stockyards. It purports to be a complete and exclusive definition of railroad duty. The commands which it describes are all that Congress intended. It and the Packers and Stock Yards Act are in *pari materia*. The latter was enacted not long after the former. The Packers and Stock Yards Act contemplates that the United States Secretary of Agriculture would have the duty of regulation. The Packers and Stock Yards Act speaks of the jurisdic-

.tion of the Secretary of Agriculture commencing where the jurisdiction of the Interstate Commerce Commission ends. The Congress reveals the thought that Section 15(5) of the Interstate Commerce Act had not gone so far as to make it the railroad duty to make the public yards available to shippers and consignees at railroad expense. Had it been the intention of Congress to require railroads to employ and compensate public stockyards for shipper use of the Yard facilities, that would have caused the jurisdiction of the Commission to be so nearly complete that nothing of consequence would have been left for assignment to the Secretary of Agriculture.

Nor do the terms of Section 15(5) bear out any view that "yardage" must be borne by railroads delivering livestock within public stockyards. In the last sentence of such Section 15(5) Congress distinguished between railroad duties at their own and at public stockyards. Since at their yards the railroads are required to provide "free passage" to shippers and consignees, the requirement that at public yards the railroads shall deliver "into suitable pens" emphasizes the distinction which Congress had in view. To require delivery "into suitable pens" is much less comprehensive than would have been a requirement that railroads provide "free passage" to and from the suitable pens at public yards. The one construction would limit the obligation to requiring the railroads to unload the livestock into suitable pens. The other would require the railroads to employ and compensate the public stockyard for providing facilities by means of which shippers may come upon the properties and use them in removal of their livestock away from the pens.

Section 15(5) was an extension of railroad obligation. Until its enactment no duty even to unload into suitable

pens rested upon railroads at public stockyards when separate yards of their own were provided on their own rails. (*Covington Stock Yards* v. *Keith*, 139 U. S. 128.) The Commission had so held prior to 1920 (*In Re Unloading of Livestock*, 52 I. C. C. 209, decided February 11, 1919); and in this amendment to the Act, Congress sought merely to require that which the Commission previously had held it was not required to do.

This view of the legislative history is confirmed by what former Senator Cummins, Chairman of the Senate Committee on Interstate and Foreign Commerce, said to the Senate in reporting and speaking in favor of the bill. In presenting the Committee view Senator Cummins declared the intent of the legislation was to extend the railroad obligation concerning livestock at public yards "to the point at which it is to leave the car." (See Congressional Record, Vol. 59, p. 674.) The reason assigned by the Senator for this extension of railroad obligation was that livestock growers shipping to public stockyards ought to know that a single railroad rate covered unloading and placement into pens and not risk being taxed with a separate charge for that unloading.

Had Congress intended more the language used would have been different. It was known that public stockyards constitute a separate facility in the nature of a public utility operated for profit. The Congress must have known of the universal exaction of a yardage charge against shippers using these public stockyards. Its whole intent later was revealed by enactment of the Packers and Stock Yards Act. By means of that Act Congress vested the Secretary of Agriculture with jurisdiction to regulate those separate charges of stockyard companies. It had already required railroads to bear the expense of unloading into suitable pens. To have required railroads to

take over and bear the expense of engaging the public stockyards for the accommodation of shippers and consignees would have been to mar a complete, sound and natural system of regulation.

As a sound system of regulation, susceptible of practical enforcement by efficient agencies, the duties of the carriers and of the Interstate Commerce Commission should end and the duties of the shippers and the Secretary of Agriculture should begin precisely at the time and place of unloading into pens. There are upwards of 79 public stockyards in the United States at which the character and volume of service to shippers vary. The right of stockyards to be paid for the use of their facilities is unquestioned. Such charges should be subject to regulation. The Interstate Commerce Commission is not equipped to regulate such charges. To say that such charges should be included in the freight rate seemingly would impose upon the Commission a task which would call for a serious change in the rate structure whenever local conditions change in the Yard, and bring about uncertainty and demoralization, and probably gross discrimination. As a separate facility, yardage charges beyond unloading into pens can be regulated by the Secretary of Agriculture in practical fashion without affecting the transportation rate structure. Such is the system of regulation created by paragraph 5 of Section 15 of the Interstate Commerce Act and by the Packers and Stock Yards Act considered together. Effect is given to that system and full justice is afforded to shippers by the Secretary of Agriculture who by elaborate organization exercises jurisdiction over all customs and practices in the Yards, and regulates all charges. The order of the Commission and of the District Court would displace order and soundness with chaos and injustice.

Conclusion

It is respectfully submitted that the order of the Commission should be annulled and set aside and its enforcement enjoined. The order is invalid as to the Yard Company separately. It is also invalid as a whole.

Respectfully submitted,

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

By CHARLES E. COTTERILL,
Its Solicitor.

70 East 45th Street,
New York, N. Y.